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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1014

THE BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Brotherhood of Railroad Trainmen, et al.,[1] pray that a writ of certiorari issue to review the

[1] Petitioners are all of the labor organization defendants herein except the Brotherhood of Locomotive Engineers (BLE), which was separately represented in the courts below, and which we understand is filing a separate petition. These petitioners, with

judgment of the United States Court of Appeals for the Fifth Circuit entered on August 31, 1971, rehearing denied November 18, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 127a-216a), is not yet officially reported, but is unofficially reported at 3 EPD ¶ 8324 (1971). The opinion of the District Court, consisting of findings of fact, conclusions of law, judgment and order (App. 1a-126a), is reported at 316 F. Supp. 567 (1970).

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the abbreviated designations used by the courts below and herein, are as follows:

Brotherhood of Railroad Trainmen (BRT), now merged into United Transportation Union (UTU);

Railroad Yardmasters of America (RYA);

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC);

Transportation-Communications Employees Union (TCU), now affiliated with BRAC;

Brotherhood of Maintenance of Way Employes (BMWE);

American Railway Supervisors Association (ARSA);

Brotherhood of Railroad Signalmen (BRS);

System Federation No. 50 of the Railway Employes' Department, AFL-CIO (System Federation No. 50);

International Association of Machinists and Aerospace Workers (IAMAW);

International Brotherhood of Electrical Workers (IBEW);

Brotherhood Railway Carmen of America (BRCA);

Brotherhood of Locomotive Firemen and Enginemen (BLF&E) now merged with UTU;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Boilermakers);

Sheet Metal Workers' International Association (SMW); and

International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers (IBFO).

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1971 (App. 217a). Petition for rehearing and rehearing *en banc* were denied on November 18, 1971 (App. 218a-219a), and the mandate of the Court of Appeals was stayed until February 8, 1971, pending application to this Court for a writ of certiorari, by order of December 10, 1971 (App. 220a). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Does the current existence of a racial imbalance among employees, presumed to have resulted from discrimination throughout "five decades of employment history", constitute a violation of the Civil Rights Act of 1964 where there has been no showing of discrimination subsequent to the Act's effective date or for a reasonable time prior thereto; and is the Act violated by a failure to correct such racial imbalance because of declining employment and the presence of white incumbent employees in jobs desired by black employees?

2. Does the fact that a railroad terminal's craft and class seniority system, standard throughout the industry and admittedly non-discriminatory in itself, constitutes an obstacle to the correction of a pre-Act racial imbalance through its protection of white job incumbents against displacement or layoff, destroy its status as a bona fide seniority system within the meaning and intent of Section 703(h) of the Civil Rights Act of 1964, and make the maintenance of the system a violation of the Act?

3. Does the judgment of the Court of Appeals, requiring that the effects of presumed discrimination prior to the effective date of the Civil Rights Act of 1964 be remedied by according to black employees preferential seniority rights withheld from white employees, violate the constitutional rights of employees who would be adversely affected, and contravene the clear intent of Congress and the provisions of the Act?

4. May a reviewing court properly reverse a judgment for defendants and order entry of a judgment for plaintiffs on the basis that the trial court proceeded on a wrong theory of relevancy of evidence, when such outright reversal effectively forecloses defendants from defending the case and offering evidence on the theory espoused by the reviewing court.

5. Is the existence of separate local unions a *per se* violation of the Civil Rights Act of 1964, when they exist on a voluntary basis, with no racial bar to membership and no limiting or adverse effect on employment opportunities; and is the Act violated by a union's failure to recruit or force membership upon a minority employee to whom membership is available upon application?

Underlying most of the questions stated above is the additional one of whether the Court of Appeals erred in reversing findings by the District Court based upon substantial evidence as to employment practices both prior and subsequent to the Civil Rights Act of 1964, and substituting contrary appellate findings of pre-Act discrimination founded upon statistics, inferences and presumptions based thereon, and the Court's own interpretation and construction of contracts and documents differing from that of testimony heard by the

trial court with respect to their intent and practical application. While not arguing this question at any length as an independent reason in support of this petition, we wish to preserve the right to urge it as a ground for reversal if the writ of certiorari is granted.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions principally involved are the following portions of Sections 703(c), 703(h), 703(j) and 706(g) of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e-2(c), 2(h), 2(j), and Sec. 2000e-5(g)):

"Sec. 703. . .

. . .

"(c) It shall be an unlawful employment practice for a labor organization—

"(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

"(2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

. . .

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment

practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . ."

. . .

"(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area."

"Section 706 . . .

. . .

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or with-

out back pay . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee; or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of Section 704(a)."

The action of the Court of Appeals also raises questions involving rights of due process under the Fifth Amendment to the Constitution of the United States, the pertinent portion of which states:

"Amendment V

". . . nor shall any person . . . be deprived of . . . property, without due process of law; . . ."

STATEMENT OF THE CASE.

This is a "pattern or practice" suit brought by the Attorney General of the United States under Section 707 of Title VII of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e-6), which became effective July 2, 1965, against the Jacksonville Terminal Company and (including parties defendant added prior to trial) 16 labor organizations, including these 15 petitioners. (See note 1, p. 1.) Section 707 provides in part as follows:

"Sec. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is

> intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States . . . ."

Broadly speaking, the complaint charged the Company with racially discriminatory practices and the union defendants with being parties to collective bargaining agreements tending to perpetuate the effects of the Company's alleged practices; and in addition it was alleged that three of the union defendants "maintain" segregated locals in violation of the Act. The detailed contentions of the parties, as well as a brief description of the lengthy pre-trial and trial proceedings, is set forth in the statement of the case with which the District Court's opinion is prefaced. (App. 1a-11a, 316 F. Supp., pp. 569-573).

In the District Court, with few exceptions the Government made no effort to establish that the union defendants had themselves been guilty of unlawful racially discriminatory acts and practices, either by specific conduct, through the operation of the provisions of collective bargaining agreements to which they are parties,[2] or by collusion and acquiescence in the Company's alleged conduct. Rather, the main thrust of the Government's contentions was that the Company had engaged in discriminatory acts and practices with respect to hiring, job assignments and promotions, and that the collective bargaining agreements, and particularly the seniority provisions thereof, perpetuated or tended to perpetuate the effects of the

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[2] In its finding of fact V, A-11, the District Court said: "The Court further finds that Government counsel agreed in open court that the provisions of each of the current collective bargaining agreements were not racially discriminatory by their terms and in and of themselves." (App. 72a, 316 F.Supp., p. 600.)

Company's discrimination. Accordingly most of the evidence related to Company practices and policies in the area of hiring and promotions, an area in which the Company was substantially free from restriction, and possessed managerial discretion, under the collective bargaining agreements.[3]

The case presented by the Government placed primary emphasis on a showing of racial imbalance with respect to Negro employment in the skilled and more highly paid positions at the Company. But the evidence also showed that both at the company and in the railroad industry as a whole there had been a drastic shrinkage in total employment, and a minimal number of new hires and promotions, during the past few decades.

The District Court found on the basis of undisputed evidence, that:

> "4. As of August 6, 1969, the Company had approximately 532 employees, a decline from a 1953 work force of approximately 1,200 employees. Of these 532 employees some 275 were white and some 257 were Negro. Approximately 50 of the 532 employees did not work full time; rather, they filled vacancies or temporary assignments as needed. The foregoing figures do not reflect employees on leave of absence or furloughed employees who did not work actively. The Company's annual passenger train volume has decreased from 35,000 in 1944 to 10,000 in 1969; annual operating expenses have dropped from $4.9 million in 1960 to $2.3 million in 1969. Losses were $5.5 million in 1960 and $2.9 million in 1961.
>
> "The Company, as a result of declining volume of operations, and to a certain extent as a result

[3] See finding of fact V, A-12, App. 72a, 316 F. Supp., p. 600.

of mechanization, has substantially contracted its work force. As a corollary of the declining work force, job vacancies and promotional opportunities have in general been minimal while reductions in force have occurred regularly. This contraction in the Company's business and corresponding reduction in manpower is not unlike that experienced by the railroads nationwide." (Finding of fact II-4; App. 13a-14a, 316 F. Supp. pp. 574-575.)

In such a factual setting, long antedating the Civil Rights Act of 1964 and continuing through the trial of this case, it would have been impossible for the Company to substantially change any pre-existing racial imbalance in employment unless it arbitrarily furloughed or demoted current incumbents of the various positions, thus artificially creating openings for new hirings and promotions.

The provisions of the collective bargaining agreements attacked by the Government are either identical to or substantially in conformity with those in effect on other railroads throughout the country, both as to the written provisions and the manner in which they are interpreted and applied. (Findings and Concl. IV-3, 4; VI-9(c); App. 60a-61a, 112a; 316 F. Supp. pp. 595, 617.) The seniority system in effect at the Company under these agreements is similarly in conformity nationally. (Findings and Concl. IV-8, 9, 10, 11; App. 64a-66a; 316 F. Supp. 597-598.) The agreements and the craft and class seniority systems had their genesis in General Order No. 27 of the Director General of Railroads, United States Railroad Administration, issued May 25, 1918, during the period of federal control of the railroads in World War I, and various supplements to said order. (Findings and Concl. IV-1, 2, 7; App. 59a-64a; 316 F. Supp. pp. 594-597.)

Similarly undisputed were the facts that the system of representation and bargaining by separate crafts and classes of employees at the Company, as required by the Railway Labor Act, is standard throughout the industry; that there are no artificial or "dual" crafts or job classifications;[4] and that there is a true functional distinction between each department, subdepartment, craft, class and job classification at the Company. (Findings and Concl. III A-4, 6; VII 3, 6, 7; App. 21a-24a; 117a-118a; 316 F. Supp., pp. 578-579, 619-620.)

Pursuant to stipulation of the parties, the District Court found, with respect to the collective bargaining agreements, that "white and Negro employees similarly situated are subject to the same provisions regarding transfer, accumulation and retention of seniority", and that their application and effect was the same, at the Company and on railroads throughout the country, regardless of the racial consist or "mix" of the employees affected. (Findings and Concl. IV-4 (and footnote 42), 5, 6; V A-10; App. 61a-63a, 71a; 316 F. Supp., pp. 595-596, 600.)

At the trial the Government made no serious or effective attempt to prove actual instances of racial discrimination in hirings or promotions by the Company, but relied on inferences to be drawn from a statistical racial imbalance among the Company's employees. Thus, there was no showing, either before or after the Act, that individual Negro employees actually competed against white for specific jobs, and that they were denied such jobs though equally or better qualified.

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[4] Compare *Norman* v. *Missouri Pacific Railroad*, 414 F. (2d) 73 (C.A. 8, 1969).

The Company, on the other hand, established, both by cross-examination of witnesses called by the Government and by testimony adduced as part of its own case, that both before and after the Act it gave consideration to all employees without regard to race, and had followed a consistent policy of hiring or promoting the best qualified persons available for any vacancies that needed to be filled.

The District Court further found that the existence of separate local unions of 2 out of the 16 defendant labor organizations, on a voluntary basis with no bar to membership, and the failure of a third to recruit or force membership upon a Negro employee to whom membership had been available at least since 1960, did not violate the Act since the evidence showed that there had been no adverse effect upon anyone's employment opportunities, or any denial of membership.

The Court of Appeals affirmed the District Court's holding that the Company's post-Act hiring and initial job assignment practices and policies, based on its "best-qualified" standard, were not discriminatory, and were "subject to no historically discriminatory antecedents". (App. 176a-186a.) But it reversed the District Court's holding insofar as promotions and transfers were concerned, on the basis that the current statistical imbalance of white employees in higher paid jobs must have resulted from pre-Act discrimination, and that the rights of the incumbent white employees under the seniority systems interposed an obstacle to the promotion and transfer of Negroes to better jobs, and hence constituted a post-Act perpetuation of pre-Act discrimination. (App. 187a-203a.) Although the evidence failed to show specific instances of pre-Act discrimination, and testimony as to the application of various collective bargaining agreements showed that

for many years prior to the Act their provisions, said by the Government to be objectionable, had not been interpreted or applied in a discriminatory manner,[5] the Court of Appeals found that the District Court should have considered the current statistical racial imbalance in the light of "five decades of employment history", and that it had erred in unduly restricting the material time-frame of the evidence.

While conceding the fact that the craft and class seniority systems promoted safety and efficiency of operation, the Court of Appeals held that they were not bona fide seniority systems within the meaning of Section 703(h) of the Act, because they operated to restrict the transfer and promotion opportunities of incumbent black employees.

The Court of Appeals did not remand the case so that more evidence might be adduced with respect to the greatly extended time-frame which it said the District Court should have considered. Rather, on the basis that statistical evidence corroborated the hypothesis of pre-Act discrimination, that "it is obvious" that agreements have not always been interpreted in a non-discriminatory fashion, that "pre-Act racial discrimination appears obvious", and that there can be "no reasonable justification" or "any plausible nonracial explanation" for the current statistical racial imbalance (App. 189a-190a), it substituted its own appellate findings and prescribed "guidelines" which the District Court must follow in granting relief. The model decree thus formulated by the Court of Appeals (App. 209a-214a) would grant superseniority to all Negro employees hired prior to the entry of the final

[5] Under the Railway Labor Act collective bargaining agreements are not usually made effective for a specific period, and the actual written agreements often continue unchanged for many years.

District Court decree on remand, permitting them to compete for job retention, transfers, or promotions on the basis of company seniority dating from their initial employment, while limiting white employees to their contractual craft and class seniority dates.

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Middle District of Florida, Jacksonville Division, as alleged in the complaint, was Section 707(a) and (b) of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e-6(a) and (b)).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case places in jeopardy the craft and class seniority systems prevailing throughout the railroad industry, and the vested rights and job security of hundreds of thousands of railroad employees. It does so by extending the scope of the Act's prohibitions far beyond the limitations of Congressional intent as shown by the legislative history and carefully drawn provisions of the statute, and by mandating a remedy for the supposed violations which itself contravenes the Act and the constitutional rights of those who would be adversely affected. The decision is in conflict with principles enunciated by this Court and at least one other Court of Appeals, as well as District Court decisions in other circuits, and is not supported by the decisions of other Courts of Appeals. And the court's method of disposition of the case by its model decree, and the scope and impact of the remedy provided therein, departs from the accepted and usual course of judicial procedure to a degree approaching denial of constitutional rights of due process.

1. The decision below is without support in the statute, contravenes the clear legislative intent, and denies constitutional rights of individual railroad employees affected.

The decision of the Court of Appeals in this case constitutes an unwarranted expansion of a judicially developed concept relating to perpetuation of the effects of pre-Act discrimination, in direct conflict with the intent of Congress. Here the court has in fact found a violation of a non-retroactive statute solely on the basis of a failure to remedy the effects of presumed pre-Act conduct, where those effects consist simply of a pre-Act racial imbalance, and the failure to remedy them is the result not of any post-Act discriminatory acts and practices, but of an industry-wide decline in employment and the presence of incumbent white employees in jobs sought by Negro employees.

That Congress did not intend other than prospective operation of Title VII of the Act, nor that it would support preferential treatment of minorities who had suffered pre-Act discrimination, is abundantly clear from the language and legislative history of the statute, and was recognized by the decision of the court below in *Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F. (2d) 980, 987 (cert. den. 397 U.S. 919 (1970)), and footnote 8 to the opinion in that case. Section 703(j) of the Act expressly proscribes any requirement of preferential treatment to correct pre-existing racial imbalance in employment. And the court below acknowledged that ". . . the Terminal must continue to protect the jobs of incumbent whites. Assuming *arguendo* for the moment that past or present discriminatory conduct has occurred, white employees need not suffer displacement, layoff, or furlough merely to satisfy some court-imposed quota or black/white ratio." (App. 162a.)

The model decree embodied in the opinion below flies in the face of that acknowledgment. It prescribes preferential treatment in the form of superseniority for Negro employees—initial employment date to be used by Negroes, while whites are limited to craft and class seniority—enabling them to displace white incumbents and thereby remedy the current statistical racial imbalance.

Such preferential treatment is in direct conflict with the intent of Congress and the express provisions of Sec. 703(j) of the Act, stating that the Act is not to be interpreted as requiring "preferential treatment to any individual or to any group because of race . . . on account of an imbalance which may exist . . . ."

The superseniority given Negro employees by the decision below would also accord them preferential treatment by conferring on them seniority rights not enjoyed by employees in the railroad industry generally, nor by the Company's white employees, to transfer and be promoted from one craft or class to another, or within a craft or class, on the basis of date of initial employment, subject only to their meeting minimum job qualification standards. Under the standard railroad seniority systems in effect at the Company seniority in one craft confers no right to transfer to another craft, nor does advancement within a craft generally depend on seniority accumulated in a lower classification.[6] Thus the decision below gives Negroes superseniority, while leaving whites with *no* seniority, for purposes of transfer and promotion.

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[6] The court below recognized that "Ordinarily seniority acquired on one of the Terminal's thirty-five seniority rosters cannot be used for bidding on a job vacancy on another roster." (App. 138a).

Sec. 703(h) of the Act provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system." Here the court below has held that the seniority systems here involved are not bona fide, but with no basis for such holding except that they present an obstacle to the correction of a pre-existing racial imbalance. A holding that such a perpetuation of consequences refutes the bona fide nature of a seniority system under Section 703(h) of the Act is a clear perversion of Congressional intent and would completely emasculate the statutory provision; and there is no other basis in the record on which the bona fide nature of the seniority systems at the Terminal may be challenged. Their non-discriminatory origin, nation-wide application regardless of the population's racial mix, and racial neutrality were not questioned by the Government, and the court below conceded that they promote the safe and efficient operation of the Terminal. (App. 193a-194a.)

The court below similarly ignored, and in effect wrote out of the statute, the obviously carefully worded provisions of Sec. 703(c) dealing with unfair employment practices of labor organizations. The findings of fact by the District Court (App. 101a-106a; 316 F. Supp., pp. 613-615) on the issues of segregated local unions and failure to recruit a Negro employee were not challenged by the Government below, which took the position that the separate locals here involved were a *per se* violation of the Act. On these as well as other issues the Court of Appeals made no attempt to justify its holding under the "clearly erroneous" principle of

Rule 52(a), so that its decision actually stands for the proposition that the Act is violated by the mere existence of separate locals on a voluntary basis, with no racial bar to membership and no effect on employment opportunities; and that it is violated by failure to recruit or force membership upon a minority employee to whom membership is available.

Finally, it is clear that the remedy prescribed by the court below, and detailed in the model decree, constitutes reverse racial discrimination in violation of the constitutional rights of employees who would be adversely affected. The "affected group" to be benefited by the decree is strictly racial, and the benefits would be conferred at the expense of the loss of jobs and valuable seniority rights by non-members of the group. While vested property rights in seniority and employment are not immune to change by proper contractual or statutory processes, their destruction on a purely racial basis cannot meet the requirements of due process of law under the Fifth Amendment to the Constitution.

2. The decision below is in conflict with decisions of this Court, the Court of Appeals for the Eighth Circuit, and District Courts in other Circuits.

In finding a violation of the Act on the basis of failure to correct a pre-existing racial imbalance, and requiring that such imbalance be remedied through preferential treatment in the form of superseniority on a racial basis, the decision below is in direct conflict with the principles stated by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, —, 28 L.Ed. (2d) 158, 164, where it said:

> ". . . the Act does not command that any person be hired simply because he was formerly the

> subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed . . . ."

Similarly condemning absolute racial preference of the sort mandated by the court below, on grounds that it would violate both the Constitution and the Civil Rights Act of 1866 (42 U.S.C., Sec. 1981), is the decision of the Court of Appeals for the Eighth Circuit in *Carter* v. *Gallagher*, — F. (2d) —, 3 FEP Cases 900 (1971).[7]

And in other railroad cases where the Attorney General has made a similar attack upon the craft and class seniority systems, and has urged as authoritative the decision of the court below, the only two decided cases, *United States* v. *St. Louis-San Francisco Ry. Co.*, 3 EPD ¶ 8263 (E.D. Mo. 1971; pending on appeal to the Court of Appeals for the Eighth Circuit), and *United States* v. *Chesapeake & Ohio Ry. Co.*, 3 EPD ¶ 8331 (E.D. Va. 1971), stand in direct conflict with the decision below. And in the *Chesapeake & Ohio* case the court expressly held the seniority systems to be bona fide.

While no other case of which we are aware, involving the same attack upon railroad craft and class seniority systems, has gone to decision or supports the holding below, a great deal of such litigation, both Government and private, is currently pending, and

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[7] While granting a modified form of relief on rehearing the court (— F. (2d) —, 4 FEP Cases 121 (1972)), did not recede from its position with respect to the unconstitutionality of absolute racial preference; and the relief afforded related to hiring of new employees, not displacement or unequal treatment of incumbents.

in almost every instance the decision of the Court of Appeals has been urged as a basis for holding such seniority systems in violation of the Act. In view of the proliferation of these cases, an authoritative ruling by this Court is desperately needed by the railroad industry, to resolve doubts of both management and employees as to their rights, obligations and liabilities, particularly in the vital areas of job security and seniority rights.

3. In reversing the District Court and ordering disposition of the case in accordance with its model decree, the Court of Appeals departed from the accepted and usual course of judicial procedure to a degree approaching denial of due process.

In this case, as contrasted with many previous civil rights decisions, there was no stipulation or admission of either post-Act or pre-Act discrimination by the defendants. To support its allegations the Government relied almost exclusively on statistics showing a racial imbalance in employment at the Terminal, and "shunned the burden of augmenting its statistics" (App. 186a) when confronted by defendants' concrete evidence of non-discriminatory employment practices and valid reasons for its personnel actions.

In connection with its holding that the Government had thus failed to prove discriminatory post-Act hiring and assignment policies or practices, the Court of Appeals stated (App. 182a):

> ". . . Once Terminal officials proffered justifying explanations for their actions, the Government should have shown that stated policies and assignment realities did not coincide after July 2, 1965.
>
> "To make such a showing, the Government must have proved that whites received job assignments

> denied blacks, that the jobs were available when the blacks applied, and that the blacks' qualifications were equal or superior to the hired whites' . . . ."

In trying the case, the District Court proceeded on the theory, which the court below recognizes as in accord with the general rule in such cases (App. 165a-167a), of a relevant time-frame consisting of a few years prior to Title VII's effective date and all years thereafter up to the decision of the case. The defendants, understandably, made no attempt to extend their evidence of non-discriminatory practices back over "five decades of employment history", nor did the Government assume for that period the burden which it had shunned as to post-Act practices.

The Court of Appeals decision holds, however, that this time-frame was too constricted; and without specific evidence or findings as to policies, acts and practices extending over the longer period, but on the basis of allegations and the same statistical case which had failed to carry the day as to post-Act practices, concludes that there must have been discrimination in hiring and assignment policies 30 or 40 years ago, the "consequences" of which (continuing racial imbalance) persisted post-Act, supplying the springboard for the drastic remedy invoked.

A piercing question emerges—how could the defendants rebut allegations considered by the District Court to be irrelevant and too remote in time to be material to the issue presented? Should the defendants have undertaken an analysis of pre-Act hires and assignments to refute the Government's allegations and statistics with respect to practices and events in the

1930's and 1940's, in the face of the District Court's ruling as to the relevant time-frame?

We submit that the ruling of the Court of Appeals that the case was tried on the wrong theory may not properly form the basis for an outright reversal of the decision of the District Court and the mandating of judgment against the defendants, thus foreclosing any opportunity of defendants to have their day in court in a trial conducted on the theory now held to be proper.

Moreover, the model decree grants preferential superseniority to Negro employees not shown to have been discriminated against, including those hired during the post-Act period when the Court of Appeals held there had *not* been discrimination in hiring on initial job assignments, to the detriment of white employees not shown to have been the beneficiaries of any discrimination. Thus the decision below grants a remedy where there was no wrong.

4. The questions involved are of vital importance to the railroad industry, and the conduct of its labor relations and craft and class collective bargaining within the framework of special statutory regulation which Congress had made applicable to it, and have not been, but should be, settled by this Court.

In this "pattern or practice" action the opinion of the Court of Appeals goes far to erode the system of collective bargaining by separate autonomous craft organizations which has long prevailed in the railroad industry pursuant to Congressional mandate. The "employment seniority" created by the model decree, conferring multi-craft rights, is completely foreign to the industry, its unique requirements, and the needs and proper objectives of its employees. Its necessary

effect is to downgrade skill levels and job security in all crafts. It would usurp one of the prime functions of collective bargaining, the seniority system under which men work, and as pointed out by the dissenting Judge, would substitute the courts for specialized statutory administrative agencies in the field of railroad labor relations.

While the Court of Appeals disavows any applicability of its decision to the railroad industry as a whole (App. 203a), the contrary is obvious from the fact that the seniority systems here held in violation of the statute are uniform throughout the industry. On the theory of the decision below, any railroad having a statistical racial imbalance among its employees is immediately vulnerable to the same kind of judgment.

The craft and class system of railroad seniority is by far the oldest and most commonly known seniority system. The railroad industry was "the first industry in which the seniority system was formally developed to any considerable extent."[8] For years the public has automatically associated seniority with railroads, and it is uniformly recognized as one of the most valuable assets of railroad employment.

Railroad seniority has from the beginning been on the basis of crafts and classes of employees. Collective bargaining on that basis has long been recognized and mandated by Congress. (Railway Labor Act, Sec. 2 Fourth, 45 U.S.C., Sec. 152 Fourth.) The statutory obligation to bargain collectively on a craft or class basis, with the exclusion of all others, has been con-

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[8] Dan H. Mater, *The Development and Operation of the Railroad Seniority System*, Univ. of Chicago Journal of Business, Vol. XIII, No. 4, October 1940, and Vol. XIV, No. 1, January 1941.

sistently enforced since this Court's decision in *Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515 (1937). The model decree of the Court of Appeals, with its cross-craft superseniority, is irreconcilable with the whole statutory scheme of representation and collective bargaining in the railroad industry.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

References in this Petition to the Appendix (App. —), are to the pages of the Appendix accompanying the Petition filed in No. 71-1010, *Jacksonville Terminal Company* v. *United States of America*.

Supreme Court, U. S.
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Nos. 71-1000, 71-1010, 71-1014

In the Supreme Court of the United States

OCTOBER TERM, 1971

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

UNITED STATES OF AMERICA

JACKSONVILLE TERMINAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 127a) [1] is reported at 451 F. 2d 418. The opinion of

[1] "Pet. App." references are to the separately bound joint appendix filed with the three petitions.

the district court (Pet. App. 1a) is reported at 316 F. Supp. 567.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1971. On September 7, 1971, the court of appeals extended the time for filing applications for rehearing in all three cases until October 1, 1971, and on September 28, 1971, the court granted a further extension to and including October 8, 1971. Petitions for re-hearing and suggestions for rehearing *en banc* were filed by the various petitioners on October 6, October 7, and October 8, 1971. The petitions for rehearing were denied on November 18, 1971. The petitions for certiorari were filed on February 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that prior to the effective date of Title VII of the Civil Rights Act of 1964 (July 2, 1965) the Jacksonville Terminal Company had hired and assigned blacks to lower paying jobs because of their race.

2. Whether the court of appeals correctly held that present seniority systems perpetuate the effects of the past discriminatory hiring and assignment practices of the Terminal Company by preventing qualified black employees from competing on an equal basis with their white contemporaries for the better paying jobs, and that such seniority systems are neither *bona fide* nor required by business necessity.

3. Whether the court of appeals abused its discretion in directing relief to overcome the present discriminatory effects of the seniority systems.

4. Whether individual employees of the Terminal are indispensable parties to this suit.

5. Whether maintenance of segregated locals by two unions, and the refusal of the local of a third union to recruit formerly excluded blacks for membership were properly held by the court of appeals to be in violation of Title VII.

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, are set forth in the Appendix, *infra*.

STATEMENT

This suit was filed by the Attorney General, pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6, against the Jacksonville Terminal Company and the 16 labor organizations which have collective bargaining agreements with the Terminal.[2]

[2] These unions are the Brotherhood of Railroad Trainmen (BRT) and Brotherhood of Locomotive Firemen and Enginemen (BLF&E), both now affiliated with the United Transportation Union (UTU); Railroad Yardmasters of America (RYA); Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC); Transportation-Communication Employees Union (TCU, now affiliated with BRAC); Brotherhood of Locomotive Engineers (BLE); Brotherhood of Maintenance of Way Employees (BMWE); American Railway Supervisors Association (ARSA); Brotherhood of Railroad Signalmen (BRS); International Association of Machinists and Aerospace Work-

The complaint alleged that the Terminal had engaged in hiring, promotion and transfer practices which discriminated against blacks; that the unions had entered into collective bargaining agreements with the Terminal which tended to perpetuate the effects of the discriminatory practices; and that three of the unions (BRAC, BMWE and BRCA) maintained segregated locals in violation of Title VII.[3] The complaint sought injunctive relief to bar future discrimination and correct the continuing effects of past discrimination.

The uncontradicted evidence at trial showed that all but eight of the Terminal's 257 black employees were assigned to lower paying, predominately black jobs and all but two of the 275 white employees were assigned to higher paying, predominately white jobs as of August 6, 1969, more than one year after the initiation of this suit (Pet. App. 133a–135a).[4] Each

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ers (IAMAW); International Brotherhood of Electrical Workers (IBEW); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Boilermakers); Sheetmetal Workers International Association (SMW); Brotherhood of Railway Carmen of America (BRCA); International Brotherhood of Firemen, Oilers and Helpers (IBFO); and System Federation No. 50 of the Railway Employees' Department, AFL-CIO (System Federation No. 50—joint bargaining agent for the IAMAW, IBEW, Boilermakers, BRAC, SMW, and IBFO). (Pet. App. 2a, n. 2; 128a, n. 2.)

[3] BRCA consolidated its two separate locals four months after the present suit was filed (Tr. 2036–2038).

[4] Of the eight blacks in otherwise all-white jobs in August 1969, four were promoted to such jobs after this suit was filed in June, 1968. Of the other four blacks, three were promoted to supervisory positions in the predominately black Baggage and Mail Department beginning in 1964, and the fourth held a

of the blacks employed by the Terminal in 1969 was initially hired into a predominately black job and none had been initially assigned or hired into a predominately white job. All but two of the predominately white jobs paid more than any of the traditionally black jobs (Pet. App. 134a–135a).[5] It was further uncontroverted that black employees could not use the seniority earned in their black jobs to bid on and hold jobs formerly reserved exclusively for whites (Pet. App. 138a-140a).

The district court, however, held that the government had failed to prove any part of its case by a preponderance of the evidence and ordered the action dismissed (Pet. App. 108a, 126a). That court ruled that it was the government's burden:

> (a) to prove that defendants had committed specific acts and practices of racial discrimination in employment since the effective date of the Act (July 2, 1965); (b) to prove the commission of such acts and practices independently with respect to each and every allegation contained in the complaint; (c) to prove that such specific acts and practices were intentional and such as to constitute a pattern or practice of racial discrimination as opposed to mere isolated acts; and (d) to establish all essential elements of its case by a preponder-

job (Switchman) which at an earlier time had been shared by blacks but which later was reserved only for whites (Pet. App. 134a–135a).

[5] The two exceptions were the jobs of Carpenter Helper and Electrician Helper, which are training jobs for the positions of Carpenters and Electricians (Pre-Trial Stip. Fact Nos. 7, 8; Pet. App. 135a).

ance of the evidence in order to establish a clear right to the injunctive relief sought [Pet. App. 108a].

While affirming the district court's finding that the Terminal had not discriminated in post-Act initial job assignment practices (with the exception of test and job criteria practices in the Baggage and Mail Department which the court of appeals found discriminatory (Pet. App. 186a, n. 26)), the court of appeals held (with one judge dissenting) that the district court had erred in failing to find (1) that the Terminal had engaged in discriminatory pre-Act hiring and assignment practices, and (2) that the effects of these practices were being perpetuated by the Terminal's present promotion and transfer policies, carried out pursuant to collective bargaining agreements with the petitioner unions (Pet. App. 189a, 199a). The court of appeals held that the district court's improper findings resulted from its having committed three principal errors of law in: (1) restricting its view of what constituted racially discriminatory conduct to specific acts occurring after the effective date of Title VII (July 2, 1965); (2) limiting evidence of discrimination to a period beginning only a few years before Title VII's effective date, and (3) not giving proper weight to the uncontroverted statistical evidence offered by the government (Pet. App. 164a–174a). After considering the other evidence of pre-Act discrimination in the rec-

ord,* along with the statistical evidence, the court of appeals concluded that pre-Act racial discrimination had been clearly established (Pet. App. 190a–191a).

The court of appeals further found that the seniority systems perpetuate the effect of the past discriminatory assignments because they prevent black employees, when a vacancy occurs, from exercising their seniority in other crafts or classes from which they had initially been excluded (Pet. App. 138a). The court of appeals held that the Terminal and Unions had failed to show that business necessity required the systems to be operated in this manner (Pet. App. 191a–199a). Accordingly, because of the continuing discriminatory impact of the seniority systems, and because of the lack of business necessity for their continuation, the court of appeals held that the seniority systems could no longer be used to restrict the seniority of qualified blacks to the lower paying jobs to which they were assigned (Pet. App. 191a–199a).

In April 1967, the Terminal began using a test devised by a supervisor as one of the factors for determining eligibility for the better paying, predominately white jobs in its Baggage and Mail Department. Blacks who took the test did not score as well as whites (Pet. App. 203a, 148a). The court of appeals ruled that use of the test was unlawful because the Terminal had failed to demonstrate that success on the

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*This evidence included a provision in the BRAC agreement until 1962 to bar promotions of blacks, and the use of the term "promotable" in several other agreements to exclude blacks from consideration for better paying jobs (Pet. App. 168a–171a, 189a–190a).

test was related to successful performance on the jobs for which it was given, and also because the Terminal had not required white incumbents in those jobs to take the test (Pet. App. 204a–206a).

Maintenance of segregated locals by BRAC and BMWE and the failure of UTU's Local 624–T to recruit blacks (coupled with its constitution's former exclusion of blacks from membership) were also found violative of Title VII by the court of appeals, as was the maintenance by the Terminal of segregated toilet, locker and shower facilities for several categories of its employees (Pet. App. 206a–209a, 156a–161a).

Finally, the court of appeals set forth guidelines for the relief to be afforded by the district court (Pet. App. 209a–214a). Petitions for rehearing and for rehearing *en banc* were denied (Pet. App. 218a–219a).

ARGUMENT

The major holding of the court of appeals here is that a seniority system which tends to lock blacks into the lower paying, traditionally black jobs to which they were assigned on the basis of their race, and thus perpetuates the effects of past discrimination, is unlawful under Title VII of the Civil Rights Act of 1964. That holding follows all of the earlier appellate decisions on this point,[7] and is in accord

[7] *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (C.A. 4); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (C.A. 4), reversed on another issue, 401 U.S. 424; *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7) (sex discrimination). Closely analgous decisions have held that

with the decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, that Title VII prohibits not only overt discrimination, but also employment practices which are neutral on their face and even in their motive, but which have a disproportionate impact on blacks or other minorities. Contrary to the suggestion of petitioners, it is clear that in enacting Title VII, Congress intended to cover the railroad industry, and did not contemplate that that industry would operate under different rules of law than other industries; nor is there justification for treating craft and class seniority systems differently from other seniority systems (see pp. 11–13 *infra*). Accordingly, while the decision below does constitute a precedent for that industry to the extent that the factual basis of prior discrimination can be shown, review by this Court is not warranted.

1. The union petitioners challenge the holding of the court of appeals that the Terminal had engaged in discriminatory pre-Act assignment practices. The statistics in this case, which were uncontroverted, show that all black employees of the Terminal hired before the Act were initially assigned to lower paying jobs whereas white employees were either initially assigned to higher paying jobs or promoted to these jobs soon after hire (Pet. App. 190a, 172a–173a).

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union referral systems which perpetuate past discrimination violate Title VII: *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (C.A. 8); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *United States* v. *Electrical Workers, Local 38*, 428 F.2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (C.A. 9), certiorari denied, No. 71–380, December 7, 1971.

Moreover, the court of appeals did not base its holding on the statistical evidence alone; it examined the "total employment picture" at the Terminal (Pet. App. 174a, 176a), including the use of provisions of collective bargaining agreements designed to discriminate against blacks (*supra*, pp. 6–7). This examination disclosed that the relegation of almost all blacks to the lower paying jobs was not accidental, but resulted from purposeful discrimination. The court's determination that the Terminal had practiced pre-Act racial discrimination comports with other appellate decisions in which similar assignment policies have been reviewed. See *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (C.A. 5). Cf. *Robinson* v. *Lorillard Corp., supra; Griggs* v. *Duke Power Co., supra.*

The court of appeals correctly held that the district court had erred in confining its view of what constituted racially discriminatory conduct to specific acts occurring after the effective date of Title VII, and in restricting the relevant evidentiary time frame for a showing of racial discrimination to a period nearly contemporaneous with Title VII (Pet. App. 164a–174a). Present employees at the Terminal hold seniority dates as far back as 1925, and more than 55 percent of them were initially hired prior to 1950 (Gov't Ex. 9). It was necessary to consider employment practices at the time of their hiring and throughout their subsequent employment in order to determine whether present practices operate to exclude present black employees, because of their race, from assign-

ments to the higher paying, traditionally white jobs. *United States* v. *Dillon Supply Co.*, 429 F.2d 800 (C.A. 4). Cf. *Griggs* v. *Duke Power Co, supra,* 401 U.S. at 429–430.[8]

2. Having determined that the seniority systems in use at the Terminal perpetuate the effects of past discriminatory hiring and assignment practices, the court of appeals correctly held they were unlawful under Title VII (Pet. App. 199a). A *bona fide* seniority system within the meaning of Section 703(h) of the Act, 42 U.S.C. 2000–e2(h), must be more than facially neutral. An apparently neutral seniority system which tends to lock blacks into lower paying, traditionally black jobs to which they were assigned on the basis of their race, perpetuates the effects of past discrimination, and is unlawful under Title VII. *Local 189, United Papermakers* v. *United States, supra; United States* v. *Bethlehem Steel Corp., supra; Robinson* v. *Lorillard Corp., supra; Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.) [9]

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[8] Petitioner unions' contention that the court of appeals' decision has unfairly prevented them from presenting evidence on pre-Act practices (BRT Pet. 21–22) is without merit. All of the petitioners had ample opportunity to and did present evidence on pre-Act practices, including extensive evidence on the relationship between provisions of the collective bargaining agreements and General Order No. 27, promulgated by the Director General of Railroads in 1918, in an effort to show the provisions were not adopted with any intention to discriminate and have no racially discriminatory effects (*e.g.*, Pet. App. 59a–63a, 51a).

[9] The legislative history of Title VII offers no comfort to employers or unions who desire to continue unaltered seniority systems which perpetuate past discrimination, petitioners' arguments to the contrary notwithstanding (Terminal Pet. 18–19; BLE Pet. 12). *Quarles* v. *Philip Morris, Inc., supra,*

Similarly, the court of appeals was correct in holding that petitioners had failed to show that business necessity precludes changing the seniority systems sufficiently to alleviate their discriminatory features. To make this showing, it must be demonstrated not merely that the seniority systems contribute to such important goals as safety and efficiency, but that they are essential to achieving these goals. And there must be no acceptable alternative systems with less racial impact which will also achieve these goals. *United States* v. *Bethlehem Steel Corp., supra,* at 662; *Robinson* v. *Lorillard Corp., supra,* at 798; *Local 189, United Papermakers* v. *United States, supra,* at 989. As the court below properly ruled, there was no showing here that employees with seniority in the classes and crafts traditionally reserved for whites are the only employees of the terminal qualified to fill vacancies in these classes and crafts (Pet. App. 194a–199a).[10] The court of appeals gave due regard to considerations of safety and efficiency by providing in its guidelines for relief that the Terminal will have an absolute right to require every employee to "possess sufficient fitness and ability to adequately perform the job" (Pet. App. 211a).

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at 516–517; *Local 189, United Papermakers* v. *United States, supra,* at 987–988; *United States* v. *Bethlehem Steel Corp., supra,* at 661.

[10] The evidence shows that all but a very few of the Terminal's jobs are "entry level" jobs for which no prior experience is necessary (Pet. App. 179a, 195a). The evidence also shows that some incumbent blacks have successfully moved to jobs formerly filled entirely by whites even with the heavy handicap of not being able to exercise their accrued seniority in their new jobs (*e.g.*, Pet. App. 134a, 169a–170a).

The court of appeals also correctly ruled (Pet. App. 176a) that the government was not required to show discriminatory motivation in the adoption of the seniority systems. It is well established that an intentionally adopted employment practice which is in fact discriminatory is not saved from illegality by a mere neutral motive or purpose which does not qualify as a business necessity. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432. Accord, *Local 189, United Papermakers* v. *United States, supra,* at 996–997; *Robinson* v. *Lorillard Corp., supra,* at 796–797; *Jones* v. *Lee Way Motor Freight, Inc., supra,* at 250; *Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194, 1201 (C.A. 7), certiorari denied, No. 71–468, December 14, 1971.

3. The relief prescribed by the court of appeals has been generally followed in such situations,[11] *i.e.,* the court defined the group of employees who had been affected by discriminatory assignment or promotion practices (the "affected group"—Pet. App. 210a) and directed that members of this group be allowed to compete on the basis of their Terminal seniority dates for vacancies in jobs formerly denied them in other crafts or classes.[12] Contrary to petitioners' conten-

[11] In a recent decision, by a divided vote, a panel of the Eighth Circuit recently refused, apparently on procedural grounds (see slip op. p. 4, n. 3), to afford similar relief. *United States* v. *St. Louis-San Francisco Railway Co.*, C.A. 8, No. 71–1247, decided February 22, 1972. On March 14, 1972, the Eighth Circuit granted the government's petition for rehearing *en banc* in that case and set the case for oral argument before the full court on May 8, 1972.

[12] Petitioners object to the court of appeals' issuance of guidelines for relief (Terminal Pet. 23–24; BRT Pet. 18; BRT Pet. 22). Courts of appeals have often issued guidelines in cases involving racial discrimination in order to give concrete direc-

tions, the relief does not give "superseniority" to members of the affected group, nor, since it applies only to future vacancies, does it require incumbents to be discharged. Rather, when a member of the affected group, after having been found to have the ability to do the job (Pet. App. 211a), has transferred into a craft or class formerly reserved for whites, total time worked for the employer (Terminal seniority) will be used by all employees, black and white, whenever resort is customarily had to seniority (Pet. App. 200a, 210a–211a). An earlier hired white employee will thus have greater seniority than a later hired black. See *United States* v. *Bethlehem Steel Corp., supra,* at 661.[13]

Further, the relief directed by the court of appeals fully protects the legitimate business interests of the Terminal by making clear that: (1) no member of the affected group may obtain a job for which the Ter-

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tions to the district court and the parties on how to cure the discrimination, *E.g., United States* v. *Bethlehem Steel Corp., supra,* at 666 (C.A. 2) (employment); *United States* v. *Sheet Metal Workers, Local 36, supra,* at 132–133, 137, 140 (C.A. 8) (employment); *Singleton* v. *Jackson Municipal Separate School Dist.*, 426 F. 2d 1364, 1369–1371 (C.A. 5) mandate modified, 430 F. 2d 368 (schools); *United States* v. *West Peachtree Tenth Corp.*, 437 F. 2d 221, 229–231 (C.A. 5) (housing). Such a procedure is particularly appropriate in suits brought under Section 707 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6, (App., *infra*), which requires the courts to cause the case to be in every way expedited.

[13] And, contrary to the bidding picture drawn by petitioner BLE (BLE Pet. 21), if an employee in an engine service craft has relinquished an earlier seniority date with the Terminal to move to his present job, he will nevertheless use that earlier date when bidding on a vacancy in his new craft against a member of the affected group.

minal determines he is not qualified; (2) members of the affected group will normally use their Terminal seniority date only once to gain a job in another craft or class; (3) no person presently holding a job will lose it, as the relief applies only to vacancies (Pet. App. 209a–211a). Similar relief has been required in every other industry in which the issue has been raised and finally adjudicated in order to afford minorities who have been the victims of past discrimination an opportunity to take their rightful place in the job complex of their employers.[14] As an "employer" within the meaning of Title VII, 42 U.S.C. 2000e(b), (*Norman* v. *Missouri Pacific Railroad*, 414 F. 2d 73, 79 (C.A. 8)), the Terminal, along with the unions, is subject to the Act's prohibitions of racial discrimination and there is no legally valid reason to except it from the Act's remedial requirements.[15]

Petitioners assert that since the court of appeals ruled that the Terminal had not discriminated in initial job assignments after the effective date of Title

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[14] *E.g.*, *United States* v. *Bethlehem Steel Corp.*, *supra* (steel-making plant); *Griggs* v. *Duke Power Co.*, *supra* (electric power plant); *United States* v. *Virginia Electric and Power Co.*, 327 F. Supp. 1034 (E.D. Va.) (electric power company); *United States* v. *Central Motor Lines, Inc.*, 4 [CCH] EPD ¶ 7624 (W.D. N.C., Civ. No. 2521, Dec. 23, 1971) (interstate motor carrier); *Local 189, United Papermakers* v. *United States*, *supra* (paper mill); *Robinson* v. *Lorillard Corp.*, *supra* (tobacco plant); *Clark* v. *American Marine Corp.*, 304 F. Supp. 603 (E.D. La.) (marine company); *Irvin* v. *Mohawk Rubber Co.*, 308 F. Supp. 152 (E.D. Ark.) (rubber plant).

[15] The language of the Act makes clear Congress' intent to cover the railroad industry. Section 701(e), 42 U.S.C. 2000e (e), in defining covered labor organizations, specifically refers to those certified under the Railway Labor Act.

VII, the court incorrectly included blacks hired after that date within the affected group. However, the court of appeals made clear that its ruling of no discrimination in post-Act initial job assignments did "not encompass the Baggage and Mail Department's personnel test or job criteria in that department" (Pet. App. 186a, n. 26).[16] Since all blacks hired by the Terminal in the post-Act period were employed as Porters in the Baggage and Mail Department and all were hired after the discriminatory test was initiated in 1967 (Pet. App. 178a), they were subjected to an employment practice made unlawful by the Act. For that reason, the court of appeals did not abuse its discretion by including them in the affected group for purposes of relief. *Griggs* v. *Duke Power* Co., *supra*, 401 U.S. 424. Cf. *United States* v. *Local 189, United Papermakers*, 301 F. Supp. 906, 912 (E.D. La).[17]

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[16] The Terminal began using the test as a factor in determining initial job assignments and transfers to better paying jobs in the Baggage and Mail Department in April 1967; the court of appeals held the test's use violated Title VII because the test had not been properly validated, and also because white incumbents in the jobs for which it was given did not have to take it (Pet. App. 204a–206a). See *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424; *Hicks* v. *Crown Zellerbach Corp.*, 319 F. Supp. 314, 321 (E.D. La.).

[17] We interpret the court of appeals' opinion as including in the affected group all those blacks hired post-Act who were subjected to the test, which included all blacks hired post-Act until the time of trial (Pet. App. 178a). The Terminal states that it has now stopped using the test (Terminal Pet 7–8, n. 4), but this information was not available to the court of appeals. Newly hired blacks who are no longer subjected to the test would not, in our view, be included in the affected group.

4. The Terminal and the Seaboard Coast Line as *amicus curiae* also ask this Court to review the issue—not argued before the court of appeals—whether in addition to the unions all workers who may henceforth be required to compete for vacancies in a larger class as a result of the corrective order are indispensable parties to this action (Terminal Pet. 24–25; Amicus Br. 2–5). Representation of employees concerning seniority rights has traditionally been entrusted to the employees' union. A labor organization has the authority to make binding changes in the seniority expectations of the employees it represents in the context of collective bargaining, changes of operations, and grievances. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Humphrey* v. *Moore*, 375 U.S. 335; *Vaca* v. *Sipes*, 386 U.S. 171. The courts have regularly ordered seniority changes under Title VII where labor organizations were the only parties to the litigation representing the interests of the affected employees, *e.g.*, *Local 189, United Papermakers* v. *United States, supra; United States* v. *Bethlehem Steel Corp., supra; Robinson* v. *Lorillard Corp., supra.* The only express appellate ruling on joinder of employees required to compete in a larger class as a result of a court order under Title VII is in accord with the holdings in the above cited cases, and in the case at bar. *Bowe* v. *Colgate-Palmolive Co., supra.* In that case the Seventh Circuit held unlawful under Title VII a job classification system which discriminated against female employees by

restricting their seniority rights to certain jobs; and in doing so rejected the company's contention that there was a failure of necessary joinder of its male employees, pointing out that the union, which was a party, had negotiated the agreement and was adequate to represent in court the interests of male employees in that agreement. 416 F.2d at 719.

In the present case as in *Bowe* the unions vigorously defended the contract they had negotiated and fully represented the interests of the employees who under the court of appeals' ruling will be required to compete for job vacancies on an equal footing with other employees.

Nor is there any issue here as to the right of employees who may feel their interests are not adequately represented by their union to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. See *Trbovich* v. *United Mine Workers of America*, No. 71-119, decided January 17, 1972. No application for intervention has been made. Where timely applications have been made in other Title VII cases, the United States has acquiesced in such intervention. See *United States* v. *Local 189, United Papermakers*, 282 F. Supp. 39 (E.D. La.) affirmed, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919.

The Terminal, and Seaboard Coast Line Railroad as *amicus curiae*, cite several cases in support of their contention that employees whose seniority may be adversely affected are indispensable parties (Terminal Pet. 24-25; Amicus Br. 2-5). Of the four

cases cited, three[18] are Title VII cases in which two district courts in Georgia ruled that employees whose seniority rights would be affected by an order eliminating discrimination are indispensable parties. The most recent of these decisions (*English*) has been appealed to the Fifth Circuit. To the extent these decisions disagree with the holding in the present case and in *Bowe, supra,* we submit they are incorrect. Their authority is at best questionable in light of the Fifth Circuit's holding in the present case and pending its consideration of *English*. The fourth case cited is *Neal* v. *System Board of Adjustment,* 348 F. 2d 722 (C.A. 8). That was not a Title VII case[19]; and the decision to dismiss was based on failure to exhaust internal union remedies, not on failure to join an indispensable party (348 F. 2d at 727).[20] Moreover,

[18] *Banks* v. *Seaboard Coast Line Railroad Co.*; 51 F.R.D. 304 (N.D. Ga.); *Hayes* v. *Seaboard Coast Line Railroad Co.*, 3 [CCH] E.P.D. ¶ 8169 (S.D. Ga., Civ. No. 2371 Apr. 19, 1971); *English* v. *Seaboard Coast Line Railroad Co.*, 4 [CCH] E.P.D. ¶ 7505 (S.D. Ga., Civ. No. 691, September 7, 1971), eappeal pending, No. 71-3362, C.A. 5.

[19] It is established that judicial decisions under the doctrine of fair representation are not binding with respect to Title VII. Compare *Taylor* v. *Armco Steel Corp.*, 429 F.2d 498 (C.A. 5), with *Whitfield* v. *Steelworkers Local 2708*, 263 F.2d 546 (C.A. 5), certiorari denied, 360 U.S. 902; and *Norman* v. *Missouri Pacific Railroad, supra*, with *Howard* v. *St. Louis-San Francisco Railway Co.*, 361 F.2d 905 (C.A. 8), certiorari denied, 385 U.S. 986.

[20] Compare *Conley* v. *Gibson*, 355 U.S. 41. While recognizing that further discussion was not necessary to its decision, the court in *Neal* stated that the Brotherhood of Clerks and representatives of the classes of employees were indispensable parties under the fair representation doctrine of *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192.

we submit that in cases concerning discrimination prohibited by Title VII, there is no more reason to assume that the unions will not adequately represent the interests of employees whose seniority may be adversely affected than there is in collective bargaining, grievances, and changes in operations. See p. 17, *supra*. It should not be assumed that such employees are necessarily opposed to the objectives of Title VII suits and, if they do in fact oppose the actions brought and do not believe they are adequately represented by their union, intervention is an adequate remedy.

5. The court of appeals properly held that the maintenance of segregated locals by BRAC and BMWE violates Section 703(c) of the Act, 42 U.S.C. 2000e-2(c). As the court of appeals observed, black employees of the Terminal belonging to the segregated BMWE local have had no vote in selecting the delegate who represents them for collective bargaining, and black employees in the segregated BRAC local have not been provided notices of openings in better paying jobs as have members of the white local. Both practices adversely affect blacks' employment opportunities (Pet. App. 207a–208a). Moreover, as the court held, UTU Local 624–T's refusal to recruit for membership blacks it represents, but whom its constitution formerly barred from membership because of their race, does not fulfill its obligation under Title VII to eradicate the effects of past discrimination (Pet. App. 208a, 159–160a). Courts have consistently held such continuing vestiges of racial discrimination to be unlawful. *Local 53, Asbestos Workers* v. *Vogler, supra; United States* v. *Sheet*

Metal Workers, Local 36, supra; United States v. *International Longshoremen's Ass'n*, 319 F. Supp. 737, 741–742 (D. Md.), appeal pending, No. 71–1367 (C.A. 4); *Hicks* v. *Crown Zellerbach Corp.*, 310 F. Supp. 536 (E.D. La); *United States* v. *Local 189, United Papermakers, supra*, 301 F. Supp. at 919.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C.S. 2000e–2(a), provides:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 703(c) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2(c), provides:

It shall be an unlawful employment practice for a labor organization—

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or

otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–2(h), provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin * * *.

Section 706(g) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–5(g), provides in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate * * *.

Section 707(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e–6(a), provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice

> of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil suit in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Section 707(b), of the 1964 Civil Rights Act, 42 U.S.C. 2000e–6(b) provides in relevant part:

> The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. * * *
>
> In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case

may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

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IN THE

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OCTOBER TERM, 1971

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THE BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Regrettably, petitioners find it necessary to respond to the contentions advanced by the Government in opposition to review by this Court of the decision of the court below. The views expressed by the Government are shown either to be not responsive to the reasons urged for granting the writ, or are erroneous characterizations of the evidence of record, the findings and conclusions of the lower court thereon and, indeed, the action required by the Court of Appeals to eliminate perpetuation of the effects of Terminal's alleged pre-Act discriminatory employment practices.

To the extent that the Government has erroneously characterized remedial action required of petitioners in an attempt to persuade the Court that review is

unnecessary, petitioners believe that such errors should be disclosed in order that the petitions receive proper consideration by the Court.

Considered as a whole, the Government's representations mainly express concurrence with the decision reached by the court below, and as such do not relate to the reasons submitted in support of the request for grant of the writ. Reference by the Government to various portions of the opinion below to support its contention that the opinion of the majority of the court below in its entirety is correct, serves no useful purpose for the Court. The challenge made by petitioners is that the findings made and relied upon by the majority below are not supported by the record, are not proper interpretations and applications of the statute involved, and the conclusions based upon such erroneous findings present substantial questions relating to a recently enacted statute such as to require review and corrective action by this Court.

In illustration, we can agree with the Government that the Court below held that the District Court committed three principal errors in (1) restricting its view of what constituted racially discriminatory conduct to specific acts occurring after the effective date of Title VII (July 2, 1965); (2) limiting evidence of discrimination to a period beginning only a few years before Title VII's effective date; and (3) in not giving proper weight to the uncontroverted statistical evidence offered by the Government (Govt. Br., p. 6).

The Government correctly states that the union petitioners challenge the holding of the Court of Appeals that the Terminal had engaged in discriminatory pre-Act assignment practices. The Government correctly asserts (Govt. Br., p. 9) that it con-

tended that the statistics in the case show that all black employees of the Terminal hired before the Act were initially assigned to lower paying jobs, whereas white employees were either initially assigned to higher paying jobs or promoted to these jobs after hiring. Its further contention, (Govt. Br., p. 10) however, that the Court of Appeals did not base its holding on the statistical evidence alone, and that the court below examined "the total employment picture" at the Terminal, is not, and cannot be, supported by the portions of the opinion to which the Government directs the attention of the Court, or by any evidence of record.

A casual reading of those portions of the opinion below referred to and relied upon here by the Government (Pet. App. 174a, 176a) alone, or in the light of the sections of the opinion immediately preceding and following the cited portions, discloses that the court below was there discussing *post-Act* Terminal employment decisions, which as shown (Pet. App. 181a-186a) it held ultimately were not racially discriminatory because the Government "only feebly attempted to refute" the evidence of non-discriminatory practices by the Terminal, and, accordingly, having "shunned the burden of augmenting its statistics, the Government's challenge in this regard must fail" (Pet. App., p. 186a).

Accordingly, as initially and now contended by petitioners, the Government is shown to rely only on a "head count" to refute petitioners' "challenge" that the holding of the court below did not, and could not, find evidentiary support in the record showing that any black employee of Terminal has been the victim of *pre*-Act discriminatory employment practices.

As to the alleged "use" by the Terminal (Govt. Br., p. 10) of provisions of collective bargaining agree-

ments claimed to have been designed to discriminate against blacks (Govt. Br., p. 7, note 6), it is submitted that the Government is relying upon the speculative and conjectural views of the majority below set forth in certain sections of their opinion (Pet. App. 168a-171a, 189a-190a), which in the light of the findings set forth in other sections of the opinion below (e.g. Pet. App. 142a-147a, 151a-152a), and evidence otherwise in the record before the court below (e.g. Pet. App. 76a-90a), cannot, as contended by petitioners, support a finding of discrimination in Terminal pre-Act hiring and assignment practices.[1]

Petitioners urge that the remaining contentions advanced by the Government as set forth on pages 10-13 of its brief are equally irrelevant because of reliance by the Government on "findings" of the court below which are shown, as contended by petitioners, to be contradicted by the relevant and probative evidence of record relied on by the District Court but ignored by the court below.

In its effort to minimize the drastic impact of the decision below, the Government has urged on this Court a plainly erroneous interpretation of the requirements imposed by the "guidelines" for changes in the

[1] Compounding of the erroneous conclusions of the court below results from the Government's endorsement of unwarranted application of the provisions of the described contracts to *all* present (and some future), black employees of Terminal whose job opportunities are not and could never have been affected by such contracts, and without consideration of the number of job opportunities available, even if it be conceded that the Firemen's contract and the Clerks' contract in some undisclosed pre-Act period caused the Terminal to discriminatorily assign blacks to certain jobs. Obviously there is no evidence to show that any present employee of Terminal was affected by the contracts at any time prior to or subsequent to 1949.

seniority provisions of the collective bargaining agreements. The Government challenges (Govt. Br., p. 14) the assertion by petitioners that the remedies ordered by the court below give "superseniority" only to members of the affected group (constituting all black employees now employed and to be employed until issuance of the final judgment of the District Court). The Government asserts that the relief applies only to future vacancies and does not require job incumbents to be "discharged" (Govt. Br. pp. 14-15). Clearly the requirement in Guideline D (Pet. App. 212a) specifically guarantees a black employee the use of a so-called Terminal seniority (initial hire) date in determining his right to demotion, layoff, furlough, or any other right affected by seniority, including promotion, in his new craft or class, while not granting such a right to any non-member (white employee) of the affected group.

The Government's further characterization at page 14 of its brief (and in note 13 thereon), that after a member of the affected group (black employee) has obtained a position in a new craft or class, total time worked for the employer (Terminal seniority) will be used by all employees, black and white, whenever resort is customarily had to seniority, is shown to be clearly erroneous by even a casual reading of the "guidelines" ordered by the court below.[2]

[2] The Government's seeming willingness to now back away from endorsement of the requirements of the "guidelines" and to urge that a number of white employees will obtain revised seniority rights, suggests either that it has lately become aware of the drastic impact the "guidelines" would have upon railroad workers and the industry or, that it is not as much concerned with mitigating the effects of alleged pre-Act discrimination against Terminal's black employees as it is in simply emasculating the railroad craft and seniority system.

The insensitivity of the Government's position becomes clearly evident by its reliance (Govt. Br., p. 18) on *Bowe* v. *Colgate-Palmalive Co.*, 416 F.2d 711, 719, as support for its argument that the several unions (petitioning unions) are parties adequate to protect the interests of the white employees whose livelihoods will be so drastically adversely affected by the grant of preferential superseniority only to black employees of Terminal. *Bowe* adds nothing startlingly different to the law than that set forth in *Steele*, *Tunstall*, and *Graham* (Pet. App. p. 151a) as concerns the duty and authority of a union to fairly represent all employees in the craft or class for which it is the collective bargaining representative. However, *Bowe* and such cases cannot be understood to have application *inter-craft*-wise, and no union subject to the Railway Labor Act can lawfully undertake to contract to provide for, or modify, seniority rights for the employees it represents as concerns jobs in crafts and classes of railway employees for which it is not the collective bargaining representative.[3] Only the court below will be found to possess such sweeping power over the jobs of railway employees throughout this nation, unless review is granted, and the ruling below required to be conformed to law.

The Government agrees (Govt. Br., p. 9) with petitioners that the decision below constitutes a precedent for the railroad industry, which can be expected to irreparably damage the livelihood of thousands of railway employees, but the Government does not believe the likelihood of that prophecy justifies review of the

[3] The finding in *Bowe* (p. 719, note 9), of the non-applicability of its ruling to employees covered by the Railway Labor Act, is not mentioned by the Government.

decision by this Court. Petitioners suggest that the philosophy and legal position of the Government disclosed by its brief in opposition warrant, if not require, a conclusion that if the decision of the majority below is allowed to stand, whenever a company is found to have had as of the effective date of the Act a racial imbalance among its employees in jobs requiring prior education, training, and experience, and there exists a collective bargaining agreement or another arrangement whereby incumbents of such jobs are given some degree of security therein, the employer and the collective bargaining representatives of such employees will be found to be in violation of the Act.

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